No. 489

SEP 22 1944

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

JAMISON COAL AND COKE COMPANY, a Corporation,
Petitioner,

vs.

KATE B. GOLTRA and E. FIELD GOLTRA, JR., Executors of the Estate of Edward F. Goltra, Deceased, and ERASTUS WELLS, J. CLARK STREETT and TOM K. SMITH, Trustees Under Indenture of Trust Dated December 28, 1934, Executed by Rolla Wells,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

JOSEPH H. GRAND,
JAMES C. JONES, JR.,
LON O. HOCKER,
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Respondents.

PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioner, Jamison Coal and Coke Company, a corporation of Pennsylvania, on February 17, 1943, instituted suit in the United States District Court for the Eastern District of Missouri in which it asked the Court to declare an equitable lien against certain funds in the hands of

Kate B. Goltra and E. Field Goltra, Jr., as executors of the estate of Edward F. Goltra, deceased, and also for the specific performance of a written contract of May 6, 1932, between petitioner and Edward F. Goltra. The respondents, Erastus Wells, J. Clark Streett, and Tom K. Smith, Trustees Under Indenture of Trust dated December 28, 1934, executed by Rolla Wells, were permitted to intervene as defendants in the District Court on the ground that they were creditors of Edward F. Goltra and that the granting of the relief sought by petitioner would impair their rights as creditors (R. 2).

Motions of respondents to dismiss the amended petition filed in said cause (R. 14-15) were sustained by the District Court (R. 15) and from a judgment of the District Court dismissing its amended petition (R. 15) petitioner duly appealed to the United States Circuit Court of Appeals for the Eighth Circuit, which affirmed the judgment of the District Court in an opinion rendered on July 27, 1944 (R. 29-41).

In the amended petition (R. 4-13), which both the District Court and the Court of Appeals held insufficient to warrant the granting of the relief prayed, it was alleged:

That in September, 1920, Edward F. Goltra, who was then the president, and a majority and controlling stockholder, of the Mississippi Valley Iron Company, and John M. Jamison, president of the petitioner, were and had been for many years close personal friends; that in September, 1920, Goltra called on Jamison at the latter's home in Greensburg, Pennsylvania, and stated to him that he (Goltra) and those associated with him, had organized the Mississippi Valley Iron Company, a Missouri corporation, for the manufacture of pig iron in the City of St. Louis; that they had recently completed a reconditioned modern blast furnace and that they had sufficient ore for the manufacture of pig iron, but that they had not been able to

secure a suitable grade of coke for the operation of their blast furnace; that petitioner was engaged in the manufacture of coke, among other products, and at the request of Goltra, and upon his representation that, although the Mississippi Valley Iron Company was at that time short on working capital, it nevertheless had on hand enough orders for pig iron which would enable it to accumulate and acquire a working capital as soon as it could fill such orders, the said Jamison agreed to and did prevail upon petitioner to sell on open account to Mississippi Valley Iron Company sufficient coke for the requirements of that company; that during October, November and December, 1920, petitioner sold to the Iron Company, on open account, coke in the aggregate amount of $167,377.40; that shortly thereafter the pig iron market suffered a collapse both in demand and price and the Iron Company was compelled to cease the manufacture of pig iron; that when the accounts for the coke so purchased by the Iron Company from petitioners became due they were not paid and that from time to time thereafter and at the instance and request of Goltra, petitioner was induced to accept sixty and ninety day trade acceptances of the Iron Company for said accounts upon the representation of Goltra that the pig iron which had previously been sold by the Iron Company would be sufficient to pay off said trade acceptances when they became due, but that said trade acceptances were never paid and that thereafter, and at the instance and request of Goltra, petitioner accepted 306 Mortgage Seven Per Cent Gold Bonds of the iron company of an aggregate face value of $153,000 in lieu of said trade acceptances, which said bonds petitioner alleged upon information and belief had been the bonds of Goltra; that said bonds bore interest until the date of their maturity, July 1, 1931, at the rate of 7% interest per annum and thereafter at the rate of 8% per annum and that all

of said bonds, together with interest thereon, were due and unpaid at the time of the filing of this suit and represented, in principal and interest, a sum in excess of $450,000.

That prior to May 6, 1932, Edward F. Goltra was asserting a claim for damages against the United States on account of the cancellation by it of a certain leasehold interest owned by Goltra on certain boats and barges; that on May 6, 1932 bills were pending in the Senate and House of Representatives of the United States authorizing and empowering Goltra to institute and prosecute a suit against the United States in the Court of Claims on account of the cancellation of his leasehold interest in said boats and barges, which bills had not then passed either the Senate or House of Representatives; that on May 6, 1932, Goltra proposed to Jamison that if petitioner would advance to him the sum of $5,000 to enable him to pay a part of the expenses incurred, and to be incurred by him in his efforts to procure the enactment of said bills and in connection with the institution and prosecution of a suit on his claim against the United States if said bills were enacted, he, Goltra, would apply a certain portion of the proceeds of any judgment which he might recover against the United States on said claim to the purchase of all, or an equivalent amount, of the mortgage bonds of the Iron Company so owned and held by petitioner; that thereupon a written contract dated May 6, 1932, was entered into between petitioner and Edward F. Goltra, setting forth the understanding arrived at between said parties, and pursuant thereto, petitioner advanced to Goltra the sum of $5,000 for the purposes and on the terms and conditions as aforesaid.

That under the terms of the written contract of May 6, 1932, Edward F. Goltra agreed that if he prevailed in his suit against the United States the net proceeds of any

judgment recovered by him therein would be applied by him to the purchase of the bonds of the Iron Company owned by petitioner, as follows:

If the net proceeds of the judgment should be less than $150,000, one-third thereof should be applied to the purchase of said bonds of an equivalent amount in value.

If the remaining proceeds of said judgment should be in excess of $150,000 and less than $250,000, an additional 40 per cent of such excess should be applied to the purchase of said bonds of an equivalent amount in value.

If the remaining proceeds of said judgment should exceed $250,000 and should be less than $350,000, an additional 50 per cent of such excess would be applied to the purchase of said bonds of an equivalent amount in value.

If the net proceeds of said judgment should exceed $350,000, all of the bonds of the Iron Company owned by petitioner would be purchased by Goltra from the net proceeds of said judgment.

The amended petition further alleged that Goltra, having thereafter been authorized and empowered so to do by an Act of Congress, instituted suit against the United States for damages for and on account of the cancellation of his leasehold interest in said boats and barges; that Goltra was awarded a judgment in said suit but died shortly thereafter; that the net proceeds of the judgment received by Goltra's executors in that suit amounted to $281,415 and that under the terms of Goltra's contract of May 6, 1932, his executors were obligated to apply the sum of $105,707 to the purchase of petitioner's bonds in an equivalent amount; that petitioner had, upon the payment of said judgment, tendered to Goltra's executors bonds of the Iron Company of the face value of $106,000 and had in conformity with said contract demanded of Goltra's executors the payment of the sum of $105,707 out of the net proceeds of said judgment in exchange for said bonds,

which demand Goltra's executors had refused and declined to comply with.

The amended petition further alleged that Edward F. Goltra was insolvent at the time of his death; that after his death claims had been filed and allowed against his estate in excess of the sum of $300,000; that the Mississippi Valley Iron Company had become bankrupt and that the bonds of that company owned by petitioner were of little or no value.

The executors of Goltra's estate filed a motion to dismiss on the ground of failure of the amended petition to state a cause of action because:

(1) The amended petition was wholly without equity.

(2) The contract of May 6, 1932, between Goltra and petitioner was champertous and therefore void and unenforceable.

The intervening defendants also filed a motion to dismiss and in addition to the foregoing grounds asserted two others:

(3) That the contract of May 6, 1932, was against public policy as constituting a speculative investment in the financial results of certain proposed legislation in Congress, therefore could not be enforced in a court of equity.

(4) That if the contract of May 6, 1932, be construed as giving petitioner a lien upon the proceeds of the claim and judgment against the United States, said lien was null and void because forbidden by the terms of Title 31, section 203, of the United States Code.

The District Court sustained both of these motions on all the grounds specified and petitioner having announced its intention of standing on the amended petition, final judgment was entered by the District Court dismissing that petition (R. 15-16).

THE HOLDING OF THE COURT OF APPEALS.

The Court of Appeals held:

(1) That the agreement of Edward F. Goltra in the contract of May 6, 1932, that he would, if he was successful in his claim against the United States, apply a certain portion of the net proceeds of any judgment recovered by him on that claim to the purchase and acquisition of all, or a part of, the bonds of the Mississippi Valley Iron Company owned by petitioner, constituted a mere promise on the part of Goltra that he would purchase said bonds if he was successful in his claim against the United States and did not create an equitable lien in favor of petitioner upon the net proceeds of the judgment recovered by him in his suit against the United States.

(2) That petitioner was not entitled to specific performance of the contract of May 6, 1932, because this would give it a preference over other creditors of Edward F. Goltra.

(3) That petitioner was not entitled to equitable relief in any event because the contract of May 6, 1932, was based on a gamble or hazard and savored of champerty under the Missouri law.

REASONS RELIED ON FOR THE ALLOWANCE OF WRIT.

(1) The holding of the Court of Appeals that the agreement of Edward F. Goltra in the contract of May 6, 1932, that if he was successful in his claim against the United States he would apply a certain part of the net proceeds of the judgment realized by him on said claim to the purchase or acquisition of all, or a part of, the bonds of the Mississippi Valley Iron Company owned by petitioner, did not create an equitable lien in favor of petitioner in

the net proceeds of the judgment recovered by Goltra on his claim against the United States, is contrary to the holding of this Court in Ingersoll v. Coram, 211 U. S. 335, 53 L. Ed. 208; Barnes v. Alexander, 232 U. S. 117, 58 L. Ed. 530; Wylie v. Coxe, 15 How. 415, 14 L. Ed. 301; In Re Paschal, 10 Wall. 483, 19 L. Ed. 992, and Valdes v. Larrinaga, 233 U. S. 705, 58 L. Ed. 1163, and is likewise contrary to the holding of the United States Circuit Courts of Appeal in McCormack v. Harrah (App., D. C.), 51 F. 2d 316; Wardman v. Leopold (App., D. C.), 85 F. 2d 277; Mitchell v. Bowman (C. C. A. 10), 123 F. 2d 445; In Re Interborough Consol. Corp. (C. C. A. 2), 288 F. 334; Walker v. Hartford Realization Company (C. C. A. 2), 74 F. 2d 56; American Surety Company v. Finletter (C. C. A. 3), 274 F. 152.

(2) There is a conflict in the decisions of the United States Supreme Court and also in the decisions of the Circuit Courts of Appeal on the question whether an agreement to pay a debt out of a particular fund gives the debtor an equitable lien on the fund. Trist v. Child, 21 Wall. 441, 22 L. Ed. 623; Christmas v. Russell, 14 Wall. 69, 20 L. Ed. 762; Wright v. Ellison, 1 Wall. 16, 17 L. Ed. 555; Jackman v. Newhold (C. C. A. 8), 28 F. 2d 107; Lone Star Cement Corp. v. Swartwout (C. C. A. 4), 93 F. 2d 767, deny, whereas Wylie v. Coxe, 15 How. 415, 14 L. Ed. 301; In re Paschal, 10 Wall. 483, 19 L. Ed. 992; Ingersoll v. Coram, 211 U. S. 335, 52 L. Ed. 208; Barnes v. Alexander, 232 U. S. 117, 58 L. Ed. 530; Valdes v. Larrinaga, 233 U. S. 705, 58 L. Ed. 1163; McCormack v. Harrah (App. D. C.), 51 F. 2d 316; Wardman v. Leopold (App. D. C.), 85 F. 2d 277; Mitchell v. Bowman (C. C. A. 10), 123 F. 2d 445; Interborough Consol. Corporation (C. C. A. 2), 288 F. 334; Walker v. Hanford Realization Co. (C. C. A. 2), 74 F. 2d 56; American Surety Co. v. Fin-

letter (C. C. A. 3), 274 F. 152, affirm the existence of an equitable lien under such an agreement.

(3) The holding of the Court of Appeals that the contract of May 6, 1932 involved a hazard or gamble and savored of champerty under the Missouri law and that as a consequence petitioner was not entitled to equitable relief in the Federal Court, is contrary to the holding of the Missouri Supreme Court in Curry v. Dahlberg, 341 Mo. 897, 110 S. W. (2d) 742, and De Pass v. Harris Wool Co., 346 Mo. 1038, 144 S. W. (2d) 146, and is also contrary to the holding of the Circuit Court of Appeals for the District of Columbia in Gesellschaft v. Brown, 78 F. 2d 410, and Wardman v. Leopold, 85 F. 2d 277.

Wherefore, your petitioner prays that a writ of certiorari be issued by this Court to the United States Circuit Court of Appeals for the Eighth Circuit, directing that Court to certify and send to this Court for its review a full and complete transcript of the record and all proceedings in the cause entitled "Jamison Coal & Coke Company, a corporation, Appellant, v. Kate B. Goltra and E. Field Goltra, Jr., executors of the estate of Edward F. Goltra, deceased, and Erastus Wells, J. Clark Streett, and Tom K. Smith, Trustees etc., appellees, No. 12,823," and that the judgment of the United States Circuit Court of Appeals for the Eighth Circuit in said cause be reversed by this Court.

Respectfully submitted,

JAMISON COAL AND COKE COMPANY,
a Corporation,

Petitioner,

By JOSEPH H. GRAND,
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LON O. HOCKER,
Counsel for Petitioner.